APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

No. 03-1574.

INTERNATIONAL UNION; United Automobile, Aerospace and Agricultural Implement Workers of America; Local 6000,
Plaintiffs-Appellants,

v.

JANINE WINTERS, et al., in their Official Capacities, Jointly and Severally,
Defendants-Appellees.

Argued: Aug. 5, 2004.
Decided and Filed: Sept. 30, 2004.

OPINION

Before: KENNEDY, SUTTON, and COOK, *Circuit Judges.*

KENNEDY, *Circuit Judge.*

The Plaintiffs, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and its affiliated Local 6000 (hereinafter referred to collectively as "UAW"), appeal from the district court's judgment holding that a random drug testing program implemented for select Michigan civil service employees, including probation and parole officers, non-custodial employees in prisons, and medical personnel who deliver medical or psychological services to persons in state custody, does not

violate the Fourth Amendment. The district court reached this conclusion as it found that the state established sufficient "special needs," based upon substantial public safety concerns, which overrode the intrusion on the Fourth Amendment rights of the employees subject to the drug testing.[1] We agree with the district court's conclusion, and AFFIRM.

BACKGROUND

The UAW represents approximately 20,000 State of Michigan employees. Under the Michigan Constitution, the Michigan Civil Service Commission has the power to regulate the terms and conditions of employment for the State's civil service. On May 20, 1999, the Commission adopted a random drug and alcohol testing program, essentially borrowing protocols and procedures issued by the United States Department of Health and Human Services and Department of Transportation. The testing program was incorporated into the 1999-2001 Collective Bargaining Agreement between the UAW and the State of Michigan. Article 52 of the Agreement identifies seven categories of "test-designated positions" that are subject to testing. The UAW represents 2,855 employees who occupy test-designated positions, all in the following four categories:[2]

> Category 2: A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.

---

[1] The parties submitted the matter to the district court for judgment based on stipulated facts and briefs in lieu of trial.

[2] Although the UAW criticizes the district court for not examining every "job," the district court did not need to evaluate each individual position because the UAW agreed to a stipulation that each of the 2,855 positions, occupied by employees it represents, requires duties, in varying amounts, within one or more of the four challenged categories. Indeed, the UAW made this stipulation and agreed to admit a representative sample of position descriptions. Thus, the UAW waived the argument concerning the need to evaluate each job description.

> Category 3: A position in which the incumbent, on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.
>
> Category 4: A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, and parolees.
>
> Category 5: A position in which the incumbent has unsupervised access to controlled substances.

The largest group of UAW represented employees now being tested consist of probation or parole officers and field service assistants. These employees are subject to testing either because they have law enforcement powers, are required or permitted to carry a firearm while on duty, or have regular unsupervised access to and direct contact with probationers or parolees. The UAW does not challenge the testing of those parole or probation officers who applied for and maintain their eligibility to carry firearms. Rather, it challenges the testing of those employees who are subject to testing only because they possess law enforcement powers or have access to and contact with probationers or parolees.

The next largest group subject to testing consists of non-custodial employees who work for the Department of Corrections or the Department of Community Health within the perimeter of the state's correctional facilities.[3] These employees are subject to testing because they have regular unsupervised access to and direct contact with prisoners.

---

[3] These employees include Athletic and Program Coordinators, Chaplains, Prison Counselors, Recreational Therapists, Special Education Teachers, Dietician/Nutritionists, State Transitional Professionals, Employment Counselors, Communication Assistants, and General Office Assistants.

A third group of test-designated positions consists of Department of Corrections and Department of Community Health employees who provide health care and psychological care to prisoners. These positions include nurses, occupational therapists, psychologists and social workers.

Finally, a fourth group consists of Department of Community Health, Department of Education, and Department of Military and Veterans Affairs employees who provide health care and other services to residents at state hospitals for the mentally ill and developmentally disabled and to residents of veterans' homes. These positions include psychiatrists, psychologists, physicians, dentists, nurses, therapists, and social workers.

After the district court denied UAW's claim for declaratory and injunctive relief and awarded judgment for the State, this appeal followed. Since the issue in this case concerns the reasonableness of a Fourth Amendment search, we review the district court's decision de novo. *Knox County Education Ass'n v. Knox County Bd. of Education*, 158 F.3d 361, 371 (6th Cir.1998).

ANALYSIS

The Fourth Amendment to the United States Constitution protects "[t]he rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It is beyond dispute that government ordered collection and testing of urine samples effects a search within the meaning of the Fourth Amendment as such tests intrude upon reasonable expectations of privacy that society has long recognized as reasonable. *See Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 619, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Because these intrusions are searches under the Fourth Amendment, we must therefore

review the State's policy for reasonableness, "which is the touchstone of the constitutionality of a governmental search." *Board of Education v. Earls*, 536 U.S. 822, 828, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). The *Earls* Court noted that in "the criminal context, reasonableness usually requires a showing of probable cause." *Id.* However, the probable cause standard, the court further noted, "'is peculiarly related to criminal investigations' and may be unsuited to determining the reasonableness of administrative searches where the 'Government seeks to prevent the development of hazardous conditions.' " *Id.* (citing *Von Raab*, 489 U.S. at 667-68, 109 S.Ct. 1384). Thus, "in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." *Von Raab*, 489 U.S. at 668, 109 S.Ct. 1384. Therefore, the Court has recognized, a search unsupported by individualized suspicion may nonetheless be reasonable when the government alleges "special needs," beyond the normal need for law enforcement, that are both substantial—important enough to override the individual's privacy interest, and sufficiently vital to suppress the normal requirements of individualized suspicion. *Chandler v. Miller*, 520 U.S. 305, 318, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

In reviewing the reasonableness of a drug testing policy, the Court has instructed that we weigh the extent of the intrusion upon the privacy interest of the individuals being tested against the promotion of the government's proffered special need in conducting the tests. *Earls*, 536 U.S. at 830, 122 S.Ct. 2559. For instance, a program may be unconstitutional even if the intrusion upon the individual's privacy rights were minimal, if the government fails to establish a sufficient special need justifying the intrusion without individualized suspicion. *See e.g. Chandler*, 520 U.S. at 318-19, 117 S.Ct. 1295. A drug testing program may also be

unconstitutional, conversely, even if the government establishes a sufficient special need, if the intrusion upon the individual's privacy interest were excessive, for instance, because of an overly intrusive testing procedure. In deciding whether the State's testing program here was justified by a sufficient special need that outweighed the privacy interest of those being tested, it is helpful to briefly review precedent in this area to see how the Supreme Court and our court have balanced these competing interests.

In *Chandler*, the Court concluded that the state failed to proffer a special need that would overcome the general prohibition against suspicionless searches. 520 U.S. at 322, 117 S.Ct. 1295. The special need in *Chandler* failed because the state's interest was found to be merely symbolic, not special. *Id.* In *Chandler*, the State of Georgia required all candidates who sought to qualify for nomination or election to a state office to certify that they had tested negative for drugs. *Id.* at 309, 117 S.Ct. 1295. In defense of the policy, Georgia asserted that the use of drugs is incompatible with holding state office since the use of drugs calls into question an official's judgment and jeopardizes the discharge of public functions. *Id.* at 318-19, 117 S.Ct. 1295. Notably lacking from Georgia's defense, the Court noted, was any indication of a concrete danger that would arise by failing to test these candidates, thus demanding departure from the individualized suspicion requirement. *Id.* Rather, the court opined, since state officials are subject to day-to-day scrutiny, do not perform safety sensitive tasks, and are not alleged to have a drug problem, "[w]hat is left . . . is the image the State seeks to project." This need, the Court concluded, is symbolic, not special. *Id.* at 321-22, 117 S.Ct. 1295.

In *Von Raab*, by contrast, the Court found that the government not only offered a sufficient special need but also that the special need outweighed the intrusion upon the privacy rights of the employees subject to the testing. 489 U.S. at 677,

109 S.Ct. 1384. In that case, the Customs Service implemented a program that made drug tests a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm. *Id.* at 660, 109 S.Ct. 1384. The Court concluded that there was a sufficient special need to test these employees without individualized suspicion because their work involved drug interdiction; they were required to carry firearms; they could be subject to bribes or blackmail by the drug smugglers they were required to interdict; and they were not subject to the day-to-day scrutiny that is the norm in the more traditional office environment. *Id.* at 668-71, 674, 109 S.Ct. 1384.

In *Earls*, the Court concluded that a school may test students for drugs who participate in extracurricular activities since the school's 'special need' to "prevent and deter" the use of drugs by students, where the school is responsible for maintaining the discipline, health, and safety of those students, outweighs the student's limited privacy interest. 536 U.S. at 834, 836, 122 S.Ct. 2559. In reaching this conclusion, the Court first considered "the nature of the privacy interest allegedly compromised by the drug testing." *Id.* at 830, 122 S.Ct. 2559. The Court noted that a "student's privacy interest is limited in a public school environment." *Id.* The Court further noted that a student's expectation of privacy is even further diminished if the student participates in extracurricular activities, since such activities are typi cally heavily regulated. *Id.*; Cf. *Vernonia School Dist.* 47J v. *Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386, 132 L.Ed.2d 564 ("Somewhat like adults who choose to participate in a closely regulated industry, students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy"). After considering the nature of the privacy interest, the Court next considered the character of the intrusion imposed by the drug test. *Id.* at 832, 122 S.Ct. 2559. Under the policy, the Court noted, a faculty monitor waits outside a closed restroom stall for the

student to produce a sample. *Id.* The Court considered this method of collection to be at most a negligible intrusion upon the student's privacy interest. *Id.* Given the student's decreased expectation of privacy and the minimally intrusive nature of the procedure, the Court concluded that the invasion upon the student's privacy was not significant. *Id.* at 834, 122 S.Ct. 2559. Next, the Court considered the special need proffered by the state. *Id.* It concluded that, despite the absence of an "identifiable drug abuse problem among . . . [the students] subject to the testing," the need to prevent and deter the use of drugs among the students who participate in extracurricular activities to be sufficiently vital to suppress the requirements of individualized suspicion. *Id.* at 836, 122 S.Ct. 2559. Finally, the Court found the drug testing program to be constitutional as it concluded that the school's special need outweighed the minimal intrusion upon the student's privacy interest. *Id.* at 836-38, 122 S.Ct. 2559.

This Circuit has also had the opportunity to consider whether a proffered special need was sufficiently vital and substantial to permit drug testing of employees without individualized suspicion. In *Knox County*, a school board adopted a drug testing program that required the testing of employees who applied for, promoted to, or transferred to, safety sensitive positions, including teachers. 158 F.3d at 363. We concluded that the school board's proffered need to ensure the safety and security of the children under its care was sufficiently vital to overcome the traditional requirements of individualized suspicion. *Id.* at 374-79. After noting that teachers and other employees who work in a school have a diminished expectation of privacy because they work in a heavily regulated industry, we held that the school board's special need in ensuring the safety and security of the children under its care outweighed the intrusion upon the employees' privacy interest. *Id.* at 384.

With these cases as a guide, we now evaluate the special needs proffered by the State. In adopting the drug testing program, the Michigan Civil Service Commission followed the recommendations of the Employment Relations Board Impasse Panel.[4] In recommending that the Civil Service Commission adopt the drug testing program proposed by the State, the Panel stated as follows:

> Employees in "test-designated" positions who abuse alcohol and drugs represent a significantly greater threat to the health and safety of themselves and others than do employees in nontest-designated positions. Employees in "test-designated" positions may be required to react to unusual or dangerous circumstances. On balance, the Impasse Panel finds that . . . drug use by classified employees occupying "test-designated" positions can impair judgment and behavior so significantly that serious injury or death may result.

We cannot merely accept a state's invocation of special needs, but rather must engage in a context-specific inquiry, examining closely the interests advanced by the state. The largest group subject to testing consists of the parole or probation officers and field service assistants. They are subject to testing because they have law enforcement powers and because they have regular access to parolees or probationers. Probation and parole officers spend a significant amount of time supervising clients away from the office and away from supervision by their superiors. Moreover, they are often required to take urinalysis drug test samples from their clients in the field, over 20 percent of whom have tested positive for unlawful drug use. Since they are responsible for supervising

---

[4] When the UAW and the State were unable to agree on a drug testing provision for the Collective Bargaining Agreement, a request was made for Impasse Panel assistance pursuant to the civil service rules governing collective bargaining. The Impasse Panel was composed of three members appointed by the Civil Service Commission.

probationers and paroles, public safety would be put in jeopardy, the state argues, if they performed this duty while under the influence of drugs or alcohol.

The second largest group consists of non-custodial employees who work in the perimeter of a correctional facility. The State contends that there is a special need to test these employees because they have unsupervised access to and direct contact with prisoners, 80 percent of whom have a history of drug and alcohol abuse. Moreover, the introduction of alcohol and drugs into correctional facilities, which prisoners could obtain possession of, presents a severe threat to security and to the safety of correctional employees and prisoners, since the use of drugs by prisoners can lead to disruptive behavior. In addition, employees who are involved in substance abuse may be vulnerable to influence by others who would bring drugs into the prison. And finally, employees under the influence of drugs or alcohol suffer from impaired judgment, which could adversely impact security within the facility as well as the safety of other employees and prisoners.

Another group of test-designated positions consists of employees who provide health care and psychological care to prisoners. As with the non-custodial employees, these employees have unsupervised access to and direct contact with prisoners, which raises the concern of the introduction of drugs or alcohol into a correctional facility, which would pose a severe threat to the security and safety of the employees and prisoners therein. In addition, these employees have access to medications, including controlled substances. Finally, if these employees were under the influence of drugs or alcohol, the health and safety of the patients these employees provided health care to could be put in jeopardy.

The final group subject to testing consists of those employees who provide health care to residents at state hospitals for the mentally ill and developmentally disabled and to

residents of veterans' homes. These employees have direct patient care responsibilities in state facilities and have access to medications, including controlled substances. An employee involved in substance abuse might succumb to the temptation to take wrongful advantage of his or her access to these controlled substances. As with the health care providers who provide care to prisoners, there is a risk of harm to the patient if a care giving employee is under the influence of drugs or alcohol.

The Plaintiff argues that the State's justification for the drug testing program does not arise to a "special need," permitting the testing of employees without individualized suspicion. It contends that, since there was no pre-existing drug problem among the employees here, the drug testing program may only constitute a "special need" if it fits under the criteria established in *Von Raab*, since in that case the Court upheld a drug testing program even though there was no pre-existing drug problem among the employees subject to testing. The Plaintiff notes that the *Chandler* Court identified four factors that it felt were decisive in determining that the customs agents in *Von Raab* could be tested even though there was no existing drug problem among them:

> 1) drug interdiction had become the Customs Bureau's primary enforcement mission; 2) the employees subject to testing had access to vast sources of contraband; 3) the agents had been targets of bribery; and 4) it was not feasible to subject the custom agents to day-to-day scrutiny. After noting these factors, the Plaintiff concludes that the State has failed to show a special need as these factors do not apply at all or only minimally apply to the test-designated categories.

The Plaintiff errs in arguing that, since there is no pervasive pre-existing drug problem among the test-designated employees, the drug testing program here may only be justified if it accords with the factors that justified the drug testing

program in *Von Raab*. We cannot, as the Plaintiff proposes, superimpose the four, context-specific factors outlined in *Von Raab* concerning customs agents onto the facts here, which involve jobs that lay in an entirely different context, to determine if the state has proffered a special need that is sufficiently vital to suppress the requirements of individualized suspicion. It is obvious that the specific factors outlined in *Von Raab* would not all or even mostly apply to another context since they were specifically distilled from the situation facing customs agents. If those factors were the test for determining whether a special need existed when there is no evidence of a pre-existing problem, then it would likely be difficult to find any special needs outside those faced by the Customs Bureau. Instead, we must consider the state civil service employees in this case who are subject to testing in their own unique context. *Knox*, 158 F.3d at 374 ("Just as the Customs agents in *Von Raab* must be considered in their own unique context, so too must the nature of the work and positions of school teachers and administrators be viewed as unique.")

Although in *Earls*, like *Von Raab*, there was no evidence of a particularized or pervasive drug problem among those subject to testing, the Plaintiff nonetheless contends that *Earls* does not support the constitutionality of the drug testing program at issue here. The Plaintiff argues, on the basis of *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)[5], that Justice Breyer's concurrence provides the Court's holding. In his concurrence, Justice Breyer emphasizes some underlying considerations to his conclu sion that no Fourth Amendment violation occurred in *Earls*. *Earls*, 536 U.S. at 838, 122 S.Ct. 2559. He noted that there is

---

[5] The *Marks* Court noted: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest ground."

a documented national drug problem among high school students, that students could opt out of the drug testing program by not participating in extracurricular activities, and that the testing program was not disciplinary in nature. The Plaintiff argues that Earls does not support the imposition of the drug testing program because there is no evidence of a general drug problem among civil service employees, the employees may not opt out of the testing, and the testing may result in discipline.

The Plaintiff's argument fails, however, not only because it attempts to apply the context specific factors announced in *Earls* to the unique context presented in this case, but also because it mischaracterizes the Court's holding. *Marks* does not apply to *Earls* since Justice Breyer concurred in the Court's opinion, not merely in the judgment. Justice Thomas' opinion of the Court not only provides the holding but also supports the proposition that a state may have a special need to deter and prevent drug use among a specific group despite the absence of a particularized or pervasive drug problem among the group.

After considering the drug testing program in its own unique context, we conclude that the State has offered "special needs" that are sufficiently vital to overcome the traditional requirements of individualized suspicion. Although there is no evidence of a particularized or pervasive drug abuse problem among the test-designated employees, it is well established that the existence of a pronounced drug problem is not an essential element to the finding of a special need. *Knox*, 158 F.3d at 374; *See also Earls*, 536 U.S. at 835, 122 S.Ct. 2559; *Von Raab*, 489 U.S. at 674-75, 109 S.Ct. 1384. Rather, the need to deter and prevent a substantial harm provides the necessary immediacy for the imposition of a drug testing program. *Earls*, 536 U.S. at 836, 122 S.Ct. 2559. As the *Earls* Court noted, it would make little sense to require the test designated group to begin using drugs before the state

was allowed to institute a program designed to deter its use. *Id.* Moreover, unlike Chandler, in tne instant case there exists the potential for substantial harm that the state is entitled to attempt to prevent. It is certainly true that employees who either have 1) law enforcement duties, 2) direct and unsupervised contact with prisoners, 80 percent of whom have a history of drug abuse, or 3) a responsibility to deliver health care or psychological services to persons in state custody, would pose a significant potential threat to the health and safety of themselves and others if they use drugs or were under the influence of drugs while on duty.

Having concluded that the state has asserted sufficient special needs, based on substantial, and not merely hypothetical, public safety concerns, to justify the testing of employees without individualized suspicion, we next consider whether the State's interest in the drug testing outweighs the employees' reasonable expectations of privacy. It is well established that an individual who participates in a heavily regulated industry or activity has a diminished expectation of privacy. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 627, 109 S.Ct. 1402, 103 L.Ed.2d 639 (noting that railroad employees have a diminished expectation of privacy because they participate in a pervasively regulated industry); *See Vernonia*, 515 U.S. at 657, 115 S.Ct. 2386 (analogizing student-athletes to employees in closely regulated industry, who "have reason to expect intrusions upon normal rights and privileges, including privacy"); *See also, Earls*, 536 U.S. at 832, 122 S.Ct. 2559 (applying the same reasoning to students who participate in extracurricular activities); *Knox County*, 158 F.3d at 379 (finding that teachers' legitimate expectation of privacy is diminished by their participation in a heavily regulated industry). The employees who are subject to testing work either in law enforcement (parole and probation officers), the medical profession (nurses, occupational therapists, etc.), or inside a prison (teachers, chaplains, dieticians, etc.). It is certainly true that parole and probation officers, who are

charged with supervision of felony offenders, participate in a heavily regulated field. Similarly, those employees who provide healthcare and other services to prisoners and pa tients of state run facilities are also subject to comprehensive regulations.

Finally, employees who work within prisons obviously work in a highly regulated context. Therefore, since these employees work in highly regulated fields, we conclude that they have a diminished expectation of privacy.

Next, we consider the character of the intrusion. The degree of intrusion caused by collecting a urine sample "depends upon the manner in which production of the urine sample is monitored." *Earls*, 536 U.S. at 832, 122 S.Ct. 2559 (quoting *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386). The procedure for collecting a urine sample under the drug testing policy at issue here requires that individual privacy be preserved unless there are grounds to suspect tampering. The policy provides that while the "specimen collector may be outside the bathroom or restroom in the near proximity, the employee closes (and locks, if he/she chooses) the door and has full privacy while urinating." This procedure is even less intrusive than the monitoring sustained in *Vernonia* as "negligible." *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386 (holding the intrusion to be "negligible" even though male students were required to produce samples at a urinal along a wall while observed from behind).

The Plaintiff argues, however, that since the drug tests are conducted on a random and continuous basis, rather than on the occurrence of a triggering event such as a promotion, the invasion of privacy is "qualitatively more intrusive" because the employees are subjected to "unrelenting scrutiny" and repeated "unsettling shows of authority." The fact that the drug tests are conducted on a random and continuous basis does not change our calculus that the drug testing program is not highly intrusive.

First, since only fifteen percent of the affected workforce is tested each year, an individual employee can expect to be tested only once every seven years on average. Moreover, to the extent the random and continuous drug tests are more intrusive, this is offset by the fact that such tests are also more efficacious than one time tests at achieving their intended result: to deter and prevent drug use to protect public safety and health. As the Court noted in Skinner[6], "[b]y ensuring that employees . . . will be tested [at a time] which no employee can predict with certainty, the [drug testing policy] significantly increase[s] the deterrent effect of the . . . penalties associated with the prohibited conduct." 489 U.S. at 630, 109 S.Ct. 1402.

Since we conclude that the State has offered sufficiently vital special needs, based on substantial public safety concerns, to overcome the traditional requirements of individualized suspicion, and that these special needs outweigh the employees diminished expectations of privacy, we AFFIRM the district court's holding that the program does not violate the Fourth Amendment to the United States Constitution.

---

[6] Although the policy in *Skinner* provides that drug tests will be conducted upon the occurrence of an accident, since no one can predict with certainty the occurrence of an accident (unlike the timing of a decision to apply for a promotion), drug tests under the policy are therefore conducted randomly.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MICHIGAN
SOUTHERN DIVISION

No. 5:00-CV-21

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), and Its Affiliated Local 6000,
Plaintiffs,

v.

JANINE WINTERS, JAMES HAVEMAN, WILLIAM S. OVERTON, THOMAS D. WATKINS, AND MAJOR GENERAL E. GORDON STUMP, in their Official Capacities, Jointly and Severally,
Defendants,

and

JOHN F. LOPEZ, in his Official Capacity,
Intervening Defendant.

April 7, 2003 *

OPINION OF THE COURT

McKEAGUE, *District Judge.*

This case presents a constitutional challenge to random drug and alcohol testing requirements imposed on many State of Michigan employees by the Michigan Civil Service Commission pursuant to a collective bargaining agreement.

---

* Editor's Note: Opinion republished to include additional material. Page 693, fourth full paragraph, through page 696, second full paragraph.

Plaintiffs International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and its affiliated Local 6000, hereinafter referred to collectively as "UAW," represent employees in the Department of Community Health, Department of Corrections, Department of Education, and Department of Military and Veterans Affairs, who are subject to these requirements. The first amended complaint contains four counts. By order dated March 30, 2001, the Court dismissed counts II and III and part of count IV. The UAW has subsequently withdrawn the remainder of the count IV claim, which was dismissed on July 11, 2002. The claim asserted in count I is the only claim remaining for adjudication.

Proceeding under 42 U.S.C. § 1983, the UAW asserts that random suspicionless drug and alcohol testing of its represented employees infringes their Fourth Amendment protection against unreasonable searches. Named as defendants are Janine Winters, Director of the Office of the State Employer; James Haveman, Director of the Department of Community Health; William S. Overton, Director of the Department of Corrections; and Thomas D. Watkins, Superintendent of Public Instruction for the Department of Education. John F. Lopez, State Personnel Director, was granted leave to intervene as a defendant in this matter. The UAW seeks declaratory relief and injunctive relief prohibiting enforcement of the drug and alcohol testing requirements.

The parties have submitted the matter to the Court for judgment based on stipulated facts and briefs in lieu of trial. Having heard oral arguments of counsel and duly considered the matter, the Court concludes, for the reasons that follow, that the UAW's claim must be denied and that defendants are entitled to judgment in their favor as a matter of law.

I

On May 20, 1999, the Civil Service Commission adopted the subject drug and alcohol testing program, essentially borrowing protocols and procedures issued by the United States Department of Health and Human Services and United States Department of Transportation. The testing program was incorporated into the 1999-2001 Collective Bargaining Agreement between the UAW and the State of Michigan. Article 52 of the Agreement identifies seven categories of "test-designated positions," which are subject to random selection basis drug and alcohol testing. The UAW represents 2,855 employees who occupy test-designated positions, all in the following four categories:

> Category 2: A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.
>
> Category 3: A position in which the incumbent, on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.
>
> Category 4: A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, or parolees.
>
> Category 5: A position in which the incumbent has unsupervised access to controlled substances.

Of the 2,855 UAW-represented employees in the test-designated positions, 2,287 are in the Department of Corrections, 560 are in the Department of Community Health, seven are in the Department of Military and Veterans Affairs, and one is in the Department of Education. Employees in these test-designated positions may be required, as a condition of continued employment, to submit to an unannounced, random, suspicionless urinalysis drug test or breath-

alyzer alcohol test. The urinalysis test tests for evidence of the use of marijuana, cocaine, opiates, amphetamine/ methamphetamine and phencyclidine. Testing was commenced on March 1, 2000. Between March 1, 2000 and June 30, 2001, 507 UAW-represented employees were subject to random testing.

II

The UAW's Fourth Amendment claim is evaluated *with reference to the Supreme Court's ruling in Chandler* v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). In *Chandler*, the court recognized that drug testing of employees "intrudes upon expectations of privacy that society has long recognized as reasonable." *Id.* at 313, 117 S.Ct. 1295, quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Government ordered intrusions of this type are "searches" under the Fourth Amendment and must therefore be "reasonable" to pass constitutional muster. *Chandler*, 520 U.S. at 313, 117 S.Ct. 1295. Ordinarily, such searches must be based on individualized suspicion of wrongdoing to be reasonable. *Id.* However, particularized exceptions have been recognized based on "special needs, beyond the normal need of law enforcement." *Id.*, quoting *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402.

Although the case law speaks of a "closely guarded" class of suspicionless searches which must be justified by a "special need," recent decisions demonstrate that practically any proper governmental purpose other than law enforcement is sufficient to constitute a special need, triggering balancing between the governmental interests and the individual's privacy interests. See *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n. 17, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001).

In *Marchwinski v. Howard*, 309 F.3d 330, 332-34 (6th Cir. 2002), the Sixth Circuit collected recent "special needs" rulings:

> The Supreme Court has ruled that government has a special need to conduct drug testing in several different circumstances where no particularized suspicion is present: testing of employees of the Customs Service who apply for positions directly involving interdiction of illegal drugs or positions requiring the agent to carry firearms, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); testing of railroad employees involved in train accidents, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); testing of student athletes in an effort to prevent the spread of drugs among the student population, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); and testing of students who participate in competitive extracurricular activities, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). This circuit has held that a school district has a special need to test applicants for all safety-sensitive positions in a school district, *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir.1998); that a city has a special need to test its municipal bus drivers, *Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475 (6th Cir.1991); and that a city has a special need to test its firemen and policemen, *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir.1990).

Defendants contend the drug and alcohol testing required under Article 52 of the Collective Bargaining Agreement is justified by such "special needs." Defendants argue that suspicionless random testing is authorized on a carefully

tailored basis only for test-designated positions, the duties of which pose significant health and safety concerns.

Yet, it is not for the Court to simply accept the State's invocation of a "special need." *Ferguson*, 532 U.S. at 81, 121 S.Ct. 1281. Rather, the Court must undertake a "close review" of the scheme at issue and "all available evidence," to determine whether the proffered special need is "substantial—important enough to override the individual's acknowledged privacy interests." *Chandler*, 520 U.S. at 318, 117 S.Ct. 1295. The Court "must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.* at 314, 117 S.Ct. 1295. *See also, Knox County Education Ass'n v. Knox County Bd. of Education*, 158 F.3d 361, 373 (6th Cir.1998).

A survey of recent decisions illustrates this interest balancing process. In Chandler, the Supreme Court struck down a Georgia statute requiring candidates for designated state offices to certify that they had taken a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the test result was negative. The court found that the state had failed to establish a special need to justify even this minimally intrusive search. In the absence of any evidence of a demonstrated problem of drug abuse among state office holders, the Chandler court concluded that the state's interest was primarily symbolic and therefore insufficient to outweigh individual privacy interests.

In Ferguson, too, the Supreme Court struck down a City of Charleston policy for lack of a showing of special need. The policy, allowing a hospital to subject pregnant patients' urine samples to drug testing without their knowledge and consent was deemed to serve primarily general law enforcement interests, even though the City asserted the beneficent purpose of protecting the health of both mother and child. That is, because of the dominance of the law enforcement

purpose, the asserted public safety concern was deemed to be secondary or even insignificant.

The Supreme Court's most recent ruling in this area is Board of Education of *Independent Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). In *Earls*, the court upheld random urinalysis drug testing of all high school students who participated in competitive extracurricular activities. The students' privacy interests were deemed to be overridden by the school district's interests in deterring and preventing drug abuse.

In the Sixth Circuit, there have been two recent rulings of interest. First, in *Knox County*, the Sixth Circuit upheld random drug testing of all persons applying for "safety sensitive" positions in a school system, including teaching positions. As to the government's special need, the court held that "a local school district has a strong and abiding interest in requiring that teachers and other school officials be drug free so that they can satisfy their statutory obligation to ensure the safety and welfare of the children." 158 F.3d at 379.

Finally, in *Marchwinski*, a unanimous panel of the court vacated a preliminary injunction issued by the district court, restraining enforcement of a statute conditioning eligibility for Family Independence Program benefits on the applicant's submission to random substance abuse testing. Whereas the district court concluded that the state had not identified a sufficient special need, the Sixth Circuit disagreed, finding that "the evidence in the case at hand establishes that Michigan's special need does encompass public safety concerns, as well as other needs 'beyond the normal need for law enforcement.'" 309 F.3d at 335. Among the public safety concerns said to be sufficiently supported in the record were concerns that substance abuse by parents contributes substantially to child abuse and neglect, and that crime associated

with illicit drug use and trafficking creates a public safety risk. *Id.* at 336. On January 21, 2003, however, the Marchwinski decision was vacated, as the Sixth Circuit submitted the case for en banc review. *Marchwinski v. Howard*, 319 F.3d 258 (6th Cir.2003). The en banc ruling has not yet issued.

III

Against this backdrop, the Court considers defendants' asserted special needs. Defendants contend the identification of test-designated positions was the result of a rigorous process designed to include only those positions that directly implicate public safety concerns. In adopting the random testing program embodied in Article 52, the Civil Service Commission followed the recommendation of the Employment Relations Board Impasse Panel. The Impasse Panel summarized the rationale for its recommendation as follows:

> The "test-designated" positions will be the only positions subject to random drug and alcohol testing. The Impasse Panel is persuaded that each of the categories of "test-designated" positions proposed by the OSE [Office of the State Employer] represents a legitimate and important concern for on-duty alcohol and drug abuse. Employees in "test-designated" positions who abuse alcohol and drugs represent a significantly greater threat to the health and safety of themselves and others than do employees in nontest-designated positions. Employees in "test-designated" positions may be required to react to unusual or dangerous circumstances. Also, the consequences of an error in judgment or performance arising out of drug or alcohol abuse are substantially greater for "test-designated" employees than for nontest-designated employees.
>
> On balance, the Impasse Panel finds that the governmental interest in the safety and security of employees,

> state institutions, and citizens outweighs the privacy concerns of the state employees in these "test-designated" positions. The Impasse Panel finds that alcohol and illegal drug use by classified employees occupying "test-designated" positions can impair judgment and behavior so significantly that serious injury or death may result. In light of these risks, the Impasse Panel believes that the state is permitted to engage in suspicionless drug and aicohol testing without violating the constitutional rights of the employees.

Stip. Ex. 21, p. 11.

The largest group of employees subject to testing consists of 1,132 parole and probation officers and 25 field service assistants. They are subject to testing because they have law enforcement powers or use firearms and because they have regular access to parolees or probationers. The UAW concedes that the requisite special need is established with respect to those parole and probation officers who are actually authorized to carry a firearm. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). As to the remainder of these positions, defendants rely heavily on the testimony of the former Director of the Department of Corrections, Kenneth McGinnis, before the Impasse Panel.

Director McGinnis testified that probation and parole officers spend a significant amount of time supervising clients away from the office and away from supervision by their superiors; that they have arrest powers and are charged with making safety and security decisions that demand alertness; that they are often required to take urinalysis drug test samples from their clients in the field, over 20 percent of whom have tested positive for unlawful drug use; and that the effectiveness of parole and probation officers would be compromised if they were under the influence of drugs or alcohol, jeopardizing public safety.

The second largest group of employees subject to testing consists of non-custodial employees in the Departments of Corrections and Community Health who work in the perimeter of a correctional facility, e.g., program coordinators, chaplains, counselors, therapists, teachers and dietician/ nutritionists. Again relying on Director McGinnis' testimony, defendants contend that these employees have unsupervised access to and direct contact with prisoners, 80 percent of whom have a history of drug and alcohol abuse; that the introduction of alcohol and drugs into correctional facilities presents a severe threat to security within the facility and to the safety of correctional employees and prisoners; that employees have been involved in introducing drugs into the prisons; that employees who are involved in substance abuse may be vulnerable to influence by others who would bring drugs into the prisons; and that employees under the influence of drugs or alcohol suffer from impaired judgment, which could adversely impact security within the facility as well as the safety of other employees and prisoners.

Another group of test-designated positions consists of Department of Corrections and Department of Community Health employees who provide health care and psychological care to prisoners, e.g., nurses, occupational therapists, psychologists and social workers. These employees, the record shows, have both unsupervised contact with prisoners and access to medications, including controlled substances. Employees in this group, too, who are under the influence of drugs or alcohol while working or who are involved in substance abuse, defendants contend, may also suffer from impaired judgment, compromising facility security as well as the health and safety of other employees and prisoners.

Finally, a fourth group consists of Department of Community Health, Department of Education, and Department of Military and Veterans Affairs employees who provide health care and other services to residents at state hospitals for the

mentally ill and developmentally disabled and to residents of veterans' homes, e.g., psychiatrists, psychologists, physicians, dentists, nurses, therapists and social workers. These employees have direct patient care responsibilities in state facilities and have access to medications, including controlled substances. Defendants contend these circumstances justify random testing because of (1) the risk of harm to vulnerable patients if a care-giving employee is under the influence; and (2) the risk that an employee involved in substance abuse might succumb to the temptation to take wrongful advantage of his or her access to controlled substances.

Defendants also contend their asserted special needs have nothing to do with law enforcement. The record demonstrates that drug and alcohol test results are kept confidential and are used exclusively for discipline in the workplace, as appropriate.

The UAW challenges the sufficiency of the asserted special needs primarily on the basis that they are hypothetical only. The UAW insists there is no demonstrated history of drug abuse among state employees in the test-designated positions. Absent such a showing, the UAW maintains, the exceptional circumstances necessary to avoid the Fourth Amendment's normal requirement of individualized suspicion are not established. See *Chandler*, 520 U.S. at 318-19, 117 S.Ct. 1295.

The Supreme Court recognized in Chandler that a demonstrated problem of drug abuse, although helpful to substantiate a special need, is not necessary in all cases. *Id.* at 319, 117 S.Ct. 1295. The court noted that in Von Raab, random drug testing of Customs Service employees was sustained despite the absence of a documented drug abuse problem among Service employees. *Id.* at 320, 117 S.Ct. 1295. The Court went on to identify the following circumstances that nonetheless justified the *Von Raab* drug testing program: (1) that drug interdiction had become the agency's primary enforcement mission; (2) that employees subject to

testing had access to vast sources of valuable contraband; (3) that Customs officers had been the targets of bribery by drug smugglers on numerous occasions and several had succumbed to the temptation; and (4) that it was not feasible to subject Customs officers to the kind of day-to-day scrutiny that is the norm in more traditional office environments. *Id.* at 321, 117 S.Ct. 1295.

In contrast, the Chandler court held the Georgia requirement that candidates for public office submit to a single pre-election urinalysis test on a date of their choosing was symbolic only. Because public safety was not genuinely implicated, the Fourth Amendment was held to preclude such suspicionless searches.

Here, it is clear that the State's justifications for random drug and alcohol testing are much more akin to those presented in *Van Raab* than Chandler. Although it cannot be said that all of the *Von Raab* justifying circumstances apply to any of the instant test-designated positions, some of them apply to each of the identified categories.

In *Earls*, moreover, the Supreme Court again recognized, in the public school context, that evidence of a particularized or pervasive drug problem is not essential. 122 S.Ct. at 2568. See also, *Knox County*, 158 F.3d at 374 ("[T]he existence of a pronounced drug problems is not a sine qua non for a constitutional suspicionless drug testing program."). The Court took notice that "drug abuse is one of the most serious problems confronting our society today." *Id.*, quoting *Von Raab*, 489 U.S. at 674, 109 S.Ct. 1384. The Earls court observed that "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." 122 S.Ct. at 2568. See also, *Knox County*, 158 F.3d at 379 ("We do not believe that the Board must wait passively for a disaster to occur before taking preemptive action to minimize the risks of such an

occurrence."). Further, the public safety concerns implicated by the instant drug and alcohol testing programs are much stronger than both those presented and found wanting in Chandler and those presented and found sufficient in Earls.

The UAW protests, contending there is no empirical evidence to support the assumption that random testing is an effective deterrent of unlawful drug use or misuse of alcohol. The efficacy of the challenged drug testing program is a factor to be considered in evaluating the sufficiency of the asserted special needs. See *Earls*, 122 S.Ct. at 2567. In Earls, the court summarily concluded that testing students who participated in extracurricular activities was a reasonably effective means of addressing the school district's legitimate safety concerns in preventing, deterring and detecting drug use. *Id.* at 2569.

This general conclusion is supported, moreover, in the present record by the testimony of Director McGinnis, who observed that drug testing of the inmate population since the 1980's has been followed by "a pretty significant drop in the number of positives."

Stip. Ex. 9, p. 59. Also supporting the conclusion that random drug testing is an effective deterrent is the report of Donald Ian Macdonald, M.D., former Director of the White House Drug Abuse Policy Office under President Ronald W. Reagan. Dr. Macdonald evaluated the Michigan testing program in light of the UAW's challenge and issued an 18-page report on March 18, 2002. He examined the "Quest Index," reflecting workplace drug testing positive rates, from 1987 to 2001, and interpreted the 74 percent decline in positive rates as "a definite sign that the program is working." Macdonald Report, pp. 4-5. Dr. Macdonald further observed:

> Michigan has adopted the federal rules and followed its recommendations for pre-employment testing, random unannounced testing, probable cause testing, post acci-

dent testing, and return-to-work testing. All of these make sense.

. . . . .

Random unannounced testing, could potentially be the most useful. The knowledge of the possibility that unannounced testing may occur at any time can be a strong deterrent to drug use. If performed often enough random tests should act as a strong incentive to avoid drug use for the worker who wants his job and knows that a failed test will have negative consequences.

Id. at p. 6.

The Court is thus satisfied that the efficacy of the challenged drug and alcohol testing program has been adequately established. The Court is also satisfied that defendants have asserted sufficient "special needs," based on substantial, and not merely hypothetical, public safety concerns, to facially justify the random testing of employees in the test-designated positions.

IV

Defendants having thus met the requisite "special need" threshold, it remains to be determined whether the State's interests outweigh individual employees' reasonable expectations of privacy. Defendants maintain they have endeavored to respect employees' privacy rights as much as possible by limiting test-designated positions to safety sensitive positions. Moreover, because of the safety and health concerns implicated, employees in test-designated positions are said to work in heavily regulated fields of employment, in which they necessarily have diminished expectations of privacy.

In Skinner, railroad employees were deemed to have diminished expectations of privacy because they participate in an industry pervasively regulated to ensure safety. 489

U.S. at 627, 109 S.Ct. 1402. In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), student-athletes were deemed to be analogous to employees in a closely regulated industry, who "have reason to expect intrusions upon normal rights and privileges, including privacy." See also, *Earls*, 122 S.Ct. at 2566 (applying the same reasoning to students who participate in extracurricular activities). In *Knox County*, the Sixth Circuit held that public school teachers participate in a heavily regulated industry and therefore have diminished expectations of privacy. 158 F.3d at 383-84.

In comparison with the above examples, it can hardly be denied that employees in the test-designated positions clearly participate in heavily regulated industries. Department of Corrections employees charged with supervision of felony offenders, parolees and probationers, certainly participate in a heavily regulated field. Similarly, healthcare and other professional providers of services to prisoners, patients and other residents of state facilities are also subject to comprehensive regulations. Indeed, the UAW does not seriously contest the proposition that employees in test-designated positions have diminished expectations of privacy.

The UAW maintains, however, that such employees are still protected by the Fourth Amendment. The UAW cites authorities from three federal circuits holding that even persons as highly regulated as prison employees cannot be subject to strip searches without reasonable suspicion.

This argument calls into question the character of the required intrusion upon privacy rights. The degree of intrusion caused by collecting a urine sample "depends upon the manner in which production of the urine sample is monitored." *Earls*, 122 S.Ct. at 2566, quoting *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386. Defendants contend their testing program is designed to be minimally intrusive. They point out that the procedure for collecting a urine specimen from an

employee requires that individual privacy be preserved unless there are grounds to suspect tampering:

> While the specimen collector may be outside the bathroom or restroom in the near proximity, the employee closes (and locks, if he/she chooses) the door and has full privacy while urinating. . . . The employee is afforded as much privacy as he/she would ordinarily have when using a restroom/bathroom at the workplace, a restaurant, or other public environment.

Report of Donna R. Smith, Ph.D., July 8, 2002, p. 1. This procedure is even less intrusive than the "indirect monitoring" (requiring monitor to wait outside closed restroom stall) sustained in *Earls* as a "negligible intrusion." See also, *Vernonia*, 515 U.S. at 658, 115 S.Ct. 2386 (holding the intrusion "negligible" even though male students were required to produce samples at a urinal along a wall while observed from behind). The instrusiveness of this procedure, marked by careful respect for employee privacy, does not even approach, of course, that of a strip search, and is properly characterized as negligible.[1]

Further, defendants insist that every effort is made to protect the confidentiality of test results. Information is not released to any law enforcement agency. In fact, unless the employee consents in writing, test results are not disclosed to anyone other than the employee, the Medical Review Officer ("MRO") and the employer. The MRO is a physician with specialized knowledge of substance abuse disorders and drug testing procedures. The MRO reviews and interprets test results and confidentially discusses any possible medical

---

[1] That the instant drug testing program results only in minimal intrusion is underscored by the UAW's concession that, because only 15 percent of the affected workforce is tested each year, an individual employee can be expected to be tested only once every seven years on average.

explanation for a positive result with the employee before reporting the results to the employer. Positive results may lead to the imposition of discipline, but any adverse action is subject to the grievance and arbitration processes provided in the Collective Bargaining Agreement. All of these circumstances militate in favor of upholding the testing as being minimally intrusive. See *Earls*, 122 S.Ct. at 2566-67.[2]

To be sure, employees in test-designated positions retain their Fourth Amendment rights. Yet, considering the minimally intrusive nature of the drug and alcohol testing required under Article 52, the Court is convinced that employees' ordinary right to freedom from suspicionless testing is outweighed by the State's substantial public safety concerns.

V

The Court has thus duly considered the competing interests implicated by the State's random drug and alcohol testing program and by the UAW's Fourth Amendment challenge to it. Under the still developing governing body of law it is clear that the program embodied in Article 52 of the Collective Bargaining Agreement is supported by sufficient "special needs," that is, legitimate governmental purposes other than law enforcement. Further, the State's public safety concerns are sufficiently substantial to outweigh the relatively minor intrusion upon privacy rights caused by the subject suspicionless testing of designated employees. Accordingly, the Court concludes the challenged program is not unconstitutional. Plaintiffs' claim under 42 U.S.C. § 1983 for declaratory and injunctive relief must therefore be denied and judgment must be awarded in favor of defendants. The Court's judgment to this effect is set forth in a separate document.

---

[2] Although the parties have not drawn a distinction between drug testing and alcohol testing in this regard, it is clear that a breathalyzer test is even less intrusive than urinalysis testing.

AMENDED JUDGMENT ORDER [1]

Plaintiffs International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) and its affiliated Local 6000, hereinafter referred to collectively as "UAW," in the lone remaining count of their first amended complaint, count I, having under 42 U.S.C. s 1983, challenged the constitutionality of random drug and alcohol testing imposed by defendant state officials upon many UAW-represented employees, who are classified state employees in the Department of Corrections, Department of Community Health, Department of Military and Veteran Affairs, and Department of Education; and

The UAW contending that the testing is violative of the Fourth Amendment protection against unreasonable searches and having sought declaratory and injunctive relief; and

The parties having submitted the matter to the Court on stipulated facts and briefs in lieu of trial, and the Court having heard oral arguments on the matter on October 28, 2002, and having taken the matter under advisement; and

The Court having carefully considered the claim under controlling Supreme Court and Sixth Circuit authorities, and having undertaken a context-specific examination of the competing private and public interests advanced by the parties; and

The Court finding that the challenged state drug and alcohol testing program is justified by sufficiently substantial "special needs" and holding that the subject random drug and alcohol testing is not violative of the Fourth Amendment;

---

[1] The original judgment order issued on March 31, 2003. This amended judgment order effects only technical corrections, amending the caption so as to delete defendant Douglas Howard, and deleting reference to the Family Independence Agency, in conformity with the stipulated order dated July 11, 2002 (docket # 47).

Now therefore, and for the reasons more fully set forth in the Court's accompanying written opinion;

IT IS HEREBY ORDERED that the UAW's claim for declaratory and injunctive relief is DENIED, and JUDGMENT is hereby AWARDED to defendants.

APPENDIX C

ARTICLE 52
DRUG AND ALCOHOL TESTING

ARTICLE 52, Section 1: Definitions

As used in this article:

(a) Alcohol test means a chemical or breath test administered for the purpose of determining the presence or absence of alcohol in a person's body.

(b) Drug means a controlled substance or a controlled substance analogue listed in schedule 1 or schedule 2 of part 72 of the Michigan public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7201, et seq., of the Michigan Compiled Laws, as may be amended from time to time.

(c) Drug test means a chemical test administered for the purpose of determining the presence or absence of a drug or metabolites in a person's bodily fluids.

(d) Random selection basis means a mechanism for selecting test designated employees for drug tests and alcohol tests that (1) results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected and (2) does not give the employer discretion to waive the selection of any employee selected under the mechanism.

(e) Reasonable suspicion means a belief, drawn from specific objective facts and reasonable inferences drawn from those facts in light of experience, that an employee is using or may have used drugs or alcohol in violation of a departmental work rule or a civil service rule or regulation. By way of example only, reasonable suspicion may be based upon any of the following:

(1) Observable phenomena, such as direct observation of drug or alcohol use or the physical symp-

toms or manifestations of being, impaired by, or under the influence of, a drug or alcohol.

(2) A report of on-duty or sufficiently recent off-duty drug or alcohol use provided by a credible source.

(3) Evidence that an individual has tampered with a drug test or alcohol test during employment with the State of Michigan.

(4) Evidence that an employee is involved in the use, possession, sale, solicitation, or transfer of drugs or alcohol while on duty, while on the employer's premises, or while operating the employer's vehicle, machinery, or equipment.

(f) Rehabilitation program means an established program to identify, assess, treat, and resolve employee drug or alcohol abuse.

(g) Test-designated employee means an employee who occupies a test designated position.

(h) Test-designated position means any of the following:

(1) A safety-sensitive position in which the incumbent is required to possess a valid commercial driver license or to operate a commercial motor vehicle, an emergency vehicle, or dangerous equipment or machinery.

(2) A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.

(3) A position in which the incumbent, on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.

(4) A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, or parolees.

(5) A position in which the incumbent has unsupervised access to controlled substances.

(6) A position in which the incumbent is responsible for handling or using hazardous or explosive materials.

(7) Another position agreed to in secondary negotiations.

Section 2: Prohibited Activities.

An employee shall not do any of the following:

(a) Consume alcohol while on duty.

(b) Consume drugs while on duty, except pursuant to a lawful prescription issued to employee.

(c) Report to duty or be on duty with a prohibited level of alcohol or drugs present in the employee's bodily fluids.

(d) Refuse to submit to a required drug test or alcohol test.

(e) Interfere with any testing procedure or tamper with any test sample.

Section 3: Testing Employees.

The employer may require an employee, as a condition of continued employment, to submit to a drug test or an alcohol test, as provided in this article.

(a) Tests Authorized.

(1) Reasonable suspicion testing. An employee shall be required to submit to a drug test or an alcohol test if there is reasonable suspicion that the employee has violated this article.

(2) Preappointment testing. An employee not occupying a test designated position shall submit to a drug test if the employee is selected for a test-designated position.

(3) Follow-up testing. An employee shall submit to an unscheduled follow-up drug test or alcohol test if, within the previous 24-month period, the employee voluntarily disclosed drug or alcohol problems, entered into or completed a rehabilitation program for drug or alcohol abuse, failed or refused a Preappointment drug test, or was disciplined for violating this rule.

(4) Random selection testing. A test-designated employee shall submit to a drug test and an alcohol test if the employee has been selected for testing on a random selection basis.

(5) Post-incident testing. A test-designated employee shall submit to a drug test or an alcohol test if there is evidence that the test designated employee may have caused or contributed to an on duty accident or incident resulting in death, or serious personal injury requiring immediate medical treatment, that arises out of any of the following:

(a) The operation of a motor vehicle.

(b) The discharge of a firearm.

(c) A physical altercation.

(d) The provision of direct health care services.

(e) The handling of dangerous or hazardous materials.

(b) Limitations on certain tests.

(1) Test selection. An employee subject to testing under this rule may be required to submit only to a

drug test, only to an alcohol test, or to both tests. How-ever, preappointment testing shall be limited to drug testing.

(2) Limitations on follow-up testing. The employer may require an employee who is subject to follow-up testing to submit to no more than six unscheduled drug or alcohol tests within any twelve month period.

(3) Limitations on random selection testing. The number of drug tests conducted in any one year on a random selection basis shall not exceed fifteen percent (15%) of the number of all test-designated positions. The number of alcohol tests conducted in any one year on a random selection basis shall not exceed fifteen percent (15%) of the number of all test-designated positions.

(4) Limitations on reasonable suspicion testing. Before an employee is subject to reasonable suspicion testing, a trained supervisor must document the basis for the reasonable suspicion. In addition, an employee shall not be subject to a reasonable suspicion test until the employer-designated drug and alcohol testing coordinator (DATC), or the DATC's designee, has given express, individualized, approval to conduct the test.

Section 4: Drug and Alcohol Testing Protocols

(a) Drug testing protocol. The employer will adopt the current "Mandatory Guidelines for Federal Workplace Drug Testing Programs," as amended, issued by the U.S. Department of Health and Human Services (the "HHS Drug Guidelines") as the protocol for drug testing under this article.

(b) Alcohol testing protocol. The employer will adopt the alcohol testing provisions of the current "Procedures

for Transportation Workplace Drug and Alcohol Testing Programs," as amended, issued by the U.S. Department of Transportation (the "DOT Alcohol Guidelines") as the protocol for alcohol testing under this article.

(c) Changes in protocol. During the term of this agreement, the parties may agree to amend the protocols without the further approval of the Civil Service Commission to include any final changes to the HHS Drug Guidelines or the DOT Alcohol Guidelines that are published in the Federal Register and become effective. If the parties agree to adopt any such final changes, the parties shall notify the State Personnel Director in writing of the changes and their effective date. Any other change in the protocols requires the approval of the Civil Service Commission.

Section 5: Prohibited Levels of Drugs and Alcohol

(a) Prohibited Levels of Drugs. It is a violation of this article for an employee to test positive for any drug under the HHS Drug Guidelines at the time the employee reports to duty or while on duty. A positive test result shall constitute just cause for the employer to discipline the donor.

(b) Prohibited Levels of Alcohol. It is a violation of this article for an employee to report to duty or to be on duty with a breath alcohol concentration equal to or greater than 0.02. A confirmatory test result equal to or greater than 0.02 shall constitute just cause for the employer to discipline the employee.

Section 6: Penalties.

(a) The employer may impose discipline, up to and including dismissal, for violation of this article. All discipline for violation of any provision of this article shall be subject to the provisions of Article 9 regarding discipline.

(b) An employee selected for a test-designated position shall not serve in the test-designated position until the employee has submitted to and passed a pre-appointment drug test. If the employee fails or refuses to submit to the drug test, interferes with a test procedure, or tampers with a test sample, the employee shall not be appointed, promoted, reassigned, recalled, transferred, or otherwise placed in the test-designated position. The Department of Civil Service shall also remove the employee from all employment lists for test-designated positions and shall disqualify the employee from any test-designated position for a period of three years. In addition, if the employee interferes with a test procedure or tampers with a test sample, the employee may also be disciplined by the employer as provided in subsection (a). An employee's qualification for appointment in the classified service is a prohibited subject of bargaining and any complaint regarding action by the Department of Civil Service shall be brought only in a Civil Service technical appeal proceeding.

Section 7: Self-reporting.

(a) Reporting. An employee who voluntarily discloses to the employer a problem with controlled substances or alcohol shall not be disciplined for such disclosure if, and only if, the problem is disclosed before the occurrence of any of the following:

(1) For reasonable suspicion testing, before the occurrence of an event that gives rise to reasonable suspicion that the employee has violated this rule.

(2) For preappointment testing, follow-up testing, and random selection testing, before the employee is selected to submit to a drug test or alcohol test.

(3) For post-incident testing, before the occurrence of any accident that results in post-accident testing.

(b) Employer action. After receiving notice, the employer shall permit the employee an immediate leave of absence to obtain medical treatment or to participate in a rehabilitation program. In addition, the employer shall remove the employee from the duties of a test-designated position until the employee submits to and passes a follow-up drug test or alcohol test. The employer may require the employee to submit to further follow-up testing as a condition of continuing or returning to work.

(c) Limitation. An employee may take advantage of the provisions of section 7(a) no more often than two times while employed in the classified service. An employee making a report is not excused from any subsequent drug or alcohol test or from otherwise complying in full with this article. An employee making a report remains subject to all drug and alcohol testing requirements after making a report and may be disciplined as the result of any subsequent drug or alcohol test, including a follow-up test.

Section 8: Union Representation.

If an employee is directed to submit to a reasonable suspicion drug or alcohol test, the employee may confer with an available UAW representative in per-son (if available on site) or by telephone. However, such contact shall not unreasonably delay the testing process.

Section 9: Identification of Test-designated Positions.

Each appointing authority shall first nominate classes of positions, subclasses of positions, or individual positions to be test-designated. The state employer shall review the nominations and shall designate as test designated positions all the classes, subclasses, or individual positions that meet one or more of the requirements of section 1(h) of this article. The designation by the state employer shall not be limited by or to the nominations or recommendations of the appointing

authority. The appointing authority shall give written notice of designation to each test-designated employee and to the UAW at least fourteen (14) days before implementing the testing provisions of this rule.

The UAW may file a grievance contesting the designation of a particular position. However, an employee occupying a position designated as a test designated position who is given notice of the designation shall be subject to testing as provided in this article until a final and binding determination is made that the employee is not occupying a test-designated position.

Section 10: Coordination of Rule and Federal Regulations.

The provisions of this article are also applicable to employees subject to mandatory Federal regulations governing drug or alcohol testing. However, in any circumstance in which (1) it is not possible to comply with both this rule and the Federal regulation or (2) compliance with this rule is an obstacle to the accomplishment and execution of any requirement of the Federal regulation, the employee shall be subject only to the provision of the Federal regulation.